BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM PECK	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,021,805
	)	
SUPERIOR INDUSTRIES INT'L.	)	
Self-Insured Respondent	)	

ORDER

Respondent and claimant requested review of the October 6, 2006 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on January 24, 2007.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh of Pittsburg, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties stipulated claimant suffered a work-related accident on February 21, 2005, but were unable to agree on the nature and extent of claimant's disability, if any. The nature and extent of claimant's disability was the sole issue litigated before the Administrative Law Judge (ALJ). Upon consideration of all the evidence, the ALJ determined claimant's termination from employment with respondent did not establish a lack of good faith in retaining appropriate employment. Consequently, the ALJ awarded the claimant a 30 percent work disability based upon a 60 percent wage loss and a 0 percent task loss.

Both parties request review of the nature and extent of disability. Respondent argues the claimant has not sustained his burden of proof that he suffered any permanent impairment and instead merely suffered a temporary aggravation of a preexisting condition

as evidenced by the fact the treating physician released claimant with a 0 percent functional impairment. But if it is determined claimant suffered a permanent impairment, respondent argues claimant is not entitled to a work disability because he was terminated from his job for violating company policy. Consequently, respondent further argues claimant would be limited to his functional impairment, which respondent again contends is 0 percent.

Conversely, claimant argues he has met his burden of proof to establish a 67.5 percent work disability based upon a 60 percent wage loss and a 75 percent task loss. Claimant further requests the Board to affirm the ALJ's Award in all other respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The respondent manufactures aluminum automobile wheels. Claimant was employed as a cell operator for respondent. Claimant operated three machines which cut the back part of the wheel off, drilled holes in the wheel and cut the front part of the wheel off. The wheels weighed from 30 to 45 pounds.

On February 21, 2005, claimant was placing wheels on the line when he felt minor discomfort in his lower back. Initially, claimant did not think it was too severe and, because it was common to experience back discomfort performing his job, he continued working. On February 24, 2005, as claimant picked up a wheel to place it on the line he felt a "fire ball shoot up my back and down my arm."[1]

Claimant reported the accident to his team leader and was told to fill out an accident report. Interestingly, the claimant filled out the accident report noting the accident occurred on February 21, 2005, the portion of the report for "Today's Date:" was filled in February 21, 2005, and claimant signed and dated the document February 21, 2005.[2] The team leader filled out a portion of the report and noted the date was February 24, 2005. The respondent's safety supervisor, Tim Rakestraw, testified that he asked claimant why he did not report the accident on the 21st and was told that claimant just thought his back would get better.

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[1] R.H. Trans. at 12.

[2] Rakestraw Depo., Ex. 4.

The respondent referred claimant for treatment with a nurse practitioner, Cheryl Lemmon, at Mt. Carmel Medical Center in Pittsburg, Kansas. Claimant was provided medication and received physical therapy at Mt. Carmel.

In the interim, on February 28, 2005, claimant was suspended pending investigation of a violation of company policy. The infraction was claimant's failure to report the alleged February 21, 2005 accident on the day it occurred. Respondent's policy, according to Mr. Rakestraw, required accident reports to be made the same day the incident occurred. Mr. Rakestraw testified the claimant admitted he knew he was required to report an accident the day it happened. The claimant was alleged to have violated work rule number 14 which provided in pertinent part: "Violating a safety or security rule or policy (includes failure to promptly report all injuries)."[3] The claimant was assessed 50 points for the infraction and because he had previously been assessed 65 points for a different safety rule infraction his total exceeded 100 points which is the threshold for discharge from employment. Consequently, claimant was terminated from employment on March 3, 2005.[4]

The claimant received unemployment compensation for a few weeks and then obtained employment with Mid-American Pipe as a sandblaster. But he only worked a week because his back pain was too severe to continue. Claimant filed an accident report with that employer and told them he could not perform the job any longer. After a few more weeks claimant obtained a job helping a friend with some roofing work but claimant could not perform the work and only lasted a week. After another five weeks of unemployment the claimant obtained a job with Calibrated Forms in Columbus, Kansas.

As previously noted, the claimant's treatment for his work-related injury began with a trip to the plant nurse and a referral for physical therapy. When the physical therapy regimen ended he did not return to the plant nurse and instead had to seek employment as he had been terminated from employment with respondent.

On May 2, 2005, Dr. Edward Prostic examined claimant at the request of claimant's attorney. Dr. Prostic diagnosed claimant with a sprain/strain of his low back which aggravated claimant's preexisting degenerative disk disease. The doctor opined the condition was caused by the work-related accident on February 21, 2005. Dr. Prostic recommended claimant be provided additional medical treatment including anti-inflammatory medication, physical therapy and rehabilitative exercises. The doctor further imposed restrictions that claimant should not be at greater than light/medium level employment with avoidance of frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment or captive positioning.

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[3] *Id.*, Ex. 5.

[4] *Id.*, Ex. 2.

Claimant scheduled a preliminary hearing and pursuant to agreement of the parties the ALJ designated Dr. Kenneth Johnson as the authorized physician to provide claimant treatment. Dr. Johnson first examined claimant on June 16, 2005. Claimant complained of upper and lower back pain as well as arm pain. Claimant was diagnosed with lumbar strain/sprain which aggravated his preexisting degenerative disk disease. Conservative treatment consisting of anti-inflammatory as well as pain medication and physical therapy was provided. An MRI of the cervical and lumbar spine was also ordered. The MRI of the cervical spine did not reveal any significant findings. The MRI of the lumbar spine revealed degenerative changes from L3 through S1 and a small herniated disk of uncertain significance. The doctor saw claimant for a follow-up examination on June 30, 2005, and noted an improvement in his motion and strength. The therapy program was continued and modifications were made to claimant's medications. The doctor provided claimant temporary restrictions to avoid lifting 50 pounds or heavier as well as occasional lifting of lighter items and avoid overhead activities.

Dr. Johnson saw claimant on July 12, 2005, for his final follow-up examination. At that office visit the claimant indicated he was doing much better and the doctor's physical examination revealed improved motion in claimant's shoulders and lumbar spine. The doctor concluded claimant was at maximum medical improvement and instructed claimant to continue his home exercise program, continue his medications and follow up with his primary care physician or the doctor as needed. Claimant was still taking the prescribed medications of Celebrex, Skelaxin and Ultram. And claimant was still in physical therapy. Although claimant continued to have back pain after completion of physical therapy he never returned to Dr. Johnson because he thought his workers compensation case was closed and he did not have the money to pay for his own treatment.

As noted, Dr. Johnson determined claimant was at maximum medical improvement on July 12, 2005, and released claimant to return to work without restrictions. Dr. Johnson later opined that, pursuant to the AMA *Guides*[5], claimant did not have any permanent impairment as a result of his work-related injury. But the doctor agreed that claimant's condition could reasonably be placed in either DRE Lumbosacral Category I or Category II which provides a 5 percent impairment.

On August 30, 2005, Dr. Edward Prostic again examined claimant at the request of claimant's attorney. Dr. Prostic rated claimant with a 12 percent functional impairment. Dr. Prostic testified that his restrictions would remain the same as those he had recommended when he had initially examined claimant. Dr. Prostic further noted that 2 to 3 percent of his rating was attributable to claimant's preexisting impairment. Dr. Prostic agreed that his second physical examination of claimant revealed claimant's motion was

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

better in forward flexion but lessened in extension and lateral bend so overall there was no significant improvement.

Claimant's attorney hired vocational expert Karen Crist Terrill to develop a list of the work tasks that claimant performed in the 15-year period before his February 21, 2005 accident. Ms. Terrill spoke with claimant in January 2006 and formulated a list of 40 different former work tasks. According to Ms. Terrill's February 13, 2006 report to claimant's attorney, claimant was working for Calibrated Forms in Columbus, Kansas at the time of their interview earning $6.50 per hour. At her deposition, which was conducted in April 2006, Ms. Terrill testified claimant described his job with Calibrated Forms as a make ready which required walking 12 hours a day and lifting rolls of paper that weighed more than 50 pounds. Claimant told Ms. Terrill that physically he was barely holding his own performing the job.

Dr. Prostic reviewed the task list prepared by vocational expert Karen Terrill and concluded that based upon his restrictions claimant could no longer perform 30 of the 40 listed tasks for a 75 percent task loss.

Claimant complains of constant minor lower back pain with pain down his right leg into his knee if he walks or stands longer than four hours. And the pain has remained constant since the injury working for respondent. But on cross-examination claimant agreed that after he was terminated from his employment with respondent the subsequent job he attempted doing sandblasting worsened his back pain. And he further testified that in his current job the constant walking, bending and twisting hurts his back. He explained that he has a dull pain in his back that never goes away but the pain goes up so that by the end of a work week his pain is a six or seven but after he is off for the weekend the pain returns to a four.

Respondent argues claimant has failed to meet his burden of proof to establish he suffered any permanent impairment as a result of his work-related injury. Respondent notes the treating physician released claimant with no restrictions and no permanent impairment.

When Dr. Johnson released claimant at maximum medical improvement on July 12, 2005, claimant was still taking the medications the doctor had prescribed and was still in physical therapy. And the doctor agreed that his zero percent impairment rating was based upon the doctor's belief that claimant's condition had improved during treatment and would continue to improve until he ultimately got to the point where he would have no impairment. But the doctor agreed that if claimant did not improve as anticipated he would want to see claimant again to determine whether he had an impairment. And the doctor further agreed that if claimant's pain complaints returned after he was weaned from his medications the doctor would potentially reinstate his restrictions.

Claimant testified that during the treatment he was provided his back pain improved but after the treatment ended his back pain worsened. And the last time claimant saw Dr. Johnson his back pain was the same as when he had injured it but Dr. Johnson told him it was a condition that would never completely go away.

As claimant's back condition did not improve, Dr. Johnson's opinion that claimant did not suffer permanent impairment is not persuasive. Dr. Prostic examined claimant after he had last received medical treatment and noted claimant's condition had not significantly improved. Dr. Prostic rated claimant with a 12 percent functional impairment but further opined that 2 to 3 percent was preexisting. The ALJ weighed the strengths and weaknesses of both medical opinions and determined claimant has a 5 percent permanent functional impairment as a result of his February 21, 2005 work-related injury. The Board agrees and affirms.

Respondent next argues claimant was terminated for violating company policy and, therefore, claimant is precluded from receiving an award for a work disability (a permanent partial general disability greater than the whole body functional impairment rating).

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company policy. The Board, however, believes the test is broader. The test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.[6] The appropriate test is whether claimant made a good faith effort to retain his employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. And whether an injured worker has made a good faith effort to retain post-injury employment is decided on a case-by-case basis as it is a question of fact to be determined after carefully examining all the facts and circumstances. In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.[7]

The respondent has established a policy of work rules violations as well as points to be assessed for violations of the rules. If an employee accumulates 100 points the penalty is discharge from employment. The claimant had received a 65 point penalty before his work-related accident when he had failed to lock out/tag out a piece of equipment. As previously noted, he was penalized an additional 50 points for failing to report his accident on the same day that it occurred. As this raised his cumulative point total to 115 points he was discharged from employment with respondent.

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[6] *See Helmstetter v. Midwest Grain Products, Inc.,* 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[7] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

The ALJ concluded that under the factual circumstances of this case, it could not be said the claimant's failure to report the accident the same day demonstrated a lack of good faith in retaining his employment. The ALJ analyzed the facts in the following manner:

> A lack of good faith implies an element of willfulness or conscious indifference. In the circumstances of retaining a job, good faith would dictate that the employee not act in a way that the employee could expect to be fired. Such *bad acts* that come to mind are excessive absences or tardiness, coming to work impaired by drugs or alcohol, disrupting the workplace or refusing to work, stealing from the workplace. The claimant's failure to report back pain the first day he noticed it just doesn't fall into the same category. It was an administrative task, not a part of the claimant's day-to-day job performance. It was an oversight rather than a conscious dereliction of duty. The claimant's late reporting in this case does not, by itself, amount to a lack of good faith in obtaining post-injury employment, even though it resulted in termination for cause according to company rules.[8]

The Board agrees and affirms. Consequently, claimant is entitled to a work disability analysis.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.[9] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had

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[8] ALJ Award (Oct. 6, 2006) at 4.

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

In this case immediately upon his termination from employment with respondent the claimant obtained other employment. As previously noted, the claimant received unemployment compensation for a few weeks and then obtained employment with Mid-American Pipe as a sandblaster. But he only worked a week because his back pain was too severe to continue. After a few more weeks claimant obtained a job helping a friend with some roofing work but claimant could not perform the work and only lasted a week. After another five weeks of unemployment the claimant obtained a job with Calibrated Forms in Columbus, Kansas. The claimant has met his burden of proof to establish that he made a good faith effort to find employment.

As claimant made a good faith effort to find appropriate employment, the difference in his pre- and post-injury wages based on the actual wages can be utilized to determine his percentage of wage loss in the work disability formula. From the date claimant was terminated until he became employed with Mid-American Pipe, claimant's wage loss was 100 percent. For the week claimant worked for Mid-American Pipe, his wage loss was 56 percent. Thereafter, while claimant was again unemployed and looking for work his wage loss was again100 percent. For the week claimant worked in the roofing job his wage loss was 61 percent. While claimant was again unemployed and looking for work his wage loss again increased to 100 percent. Finally, claimant obtained employment with Calibrated Forms earning an average weekly wage of $308.75 which results in a 60 percent wage loss. In this case, because there is no gap in benefits, the award of permanent partial disability compensation calculates the same by using only the last wage loss percentage and the last percentage of work disability.[10] Therefore, the award will be calculated based upon a 60 percent wage loss.

The sole task loss opinion was provided by Dr. Prostic who reviewed the task list prepared by vocational expert Karen Terrill. Dr. Prostic concluded that based upon his restrictions the claimant could no longer perform 30 of the 40 listed tasks for a 75 percent task loss. But Ms. Terrill testified that claimant described his job with Calibrated Forms as a make ready which required walking 12 hours a day and lifting rolls of paper that weighed more than 50 pounds. The claimant further testified that in his present job with Calibrated Forms, he also performs constant bending and twisting.

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[10] *See Frazee v. Golden Wheat, Inc.*, WCAB Docket No. 201,840 (Dec. 2001); and footnote 9 at p. 8 in *Wempe v. Topeka Winnelson*, WCAB Docket No. 236,505 (Oct. 2001).

The ALJ noted that claimant has demonstrated the present ability to perform work that exceeds the permanent restrictions placed on him by Dr. Prostic. Consequently, the ALJ disregarded the doctor's task loss opinion because it was based upon restrictions which do not accurately reflect claimant's demonstrated actual physical abilities.

The fact that claimant continues to perform physical labor that exceeds his restrictions can mean that such activity continues to aggravate and accelerate claimant's condition or that the economic necessity of working compels claimant to endure the pain caused by exceeding his restrictions, or it can demonstrate that his restrictions were not appropriate. In this instance, because claimant exceeded his restrictions for an extended number of months without the necessity of additional medical treatment, the ALJ concluded that Dr. Prostic's restrictions were not appropriate. Accordingly, those same restrictions were not appropriate to establish a task loss. The ALJ concluded claimant had failed to meet his burden of proof to establish a task loss. The Board agrees and affirms that result.

The Board is not finding the restrictions were not appropriate. Rather, the Board believes claimant is exceeding his restrictions due to an inability to find appropriate work within his restrictions and his necessity for earning an income. Nevertheless, so long as claimant is working for wages in an employment that requires him to routinely exceed his restrictions, it is not appropriate to find a task loss based upon those restrictions. It is illogical to award a work disability for tasks claimant is actually performing. Absent a new injury, claimant can file for review and modification should he find other employment or reach a point where he can no longer tolerate the pain caused by working outside his restrictions.

The work disability formula requires that the percentage of wage loss and task loss be averaged to arrive at the work disability. In this case the 60 percent wage loss averaged with the 0 percent task loss results in a 30 percent work disability. As previously noted, there were periods of time when claimant's wage loss changed. Generally, whenever there is no gap in disability benefits, the total disability compensation award is the same as if the award were calculated using only the last percentage of permanent impairment. There would be no difference in compensation had this award been calculated using the various changed percentages of wage loss and resultant work disabilities. Because of this, the Board sometimes will only show the abbreviated calculation, but with an explanation that although the percentage of disability changed it makes no difference in the award. That is the case here.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 6, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority's finding of task loss. I believe the majority has misconstrued the purpose of work restrictions, which are intended to protect a worker from additional injury. Nevertheless, there is no guarantee a worker will not sustain additional injury by observing those restrictions. Conversely, there is no guarantee a worker will sustain additional injury by working outside those restrictions, although the likelihood of re-injury may be increased. And, in this instance, there is evidence claimant is barely able to perform his post-injury job.

I do not feel claimant's task loss should be reduced merely because he may be working beyond his restrictions while trying to maintain post-injury employment. Moreover, respondent derives a benefit from that employment in the form of a reduced wage loss percentage in the permanent disability formula. Claimant should not be further penalized with a reduced task loss percentage. The majority's decision, in essence, illustrates the saying "A good deed never goes unpunished."

I believe claimant's permanent partial general disability should be based upon a 60 percent wage loss and a 75 percent task loss for a 68 percent work disability.

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge